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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 149

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

THE COLORADO AND SOUTHERN RAILWAY COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE BYNTHORP-HARTEN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The Colorado and Southern Railway Company effected a Plan of Adjustment of its indebtedness under former Chapter XV of the Bankruptcy Act, sometimes called the McLaughlin Act, which was passed for the purpose of helping railroads which were temporarily in financial difficulty, but not in need of complete reorganization, to meet their obligations, thus enabling them better to sustain the unusual demands upon them as a part of the war effort. The Plan was approved by decree of March 8, 1943, of the specially constituted District Court.

Pursuant to the requirements of that Act, the Secretary

of the Treasury was served with copy of the petition for approval of the Plan, and notified of the date for hearing.

The Railway Company alleged that, so far as it had knowledge, the United States was not a creditor on claims for taxes and that no such claims were affected by the Plan. The United States made an investigation before the hearing, filed no claims for taxes and did not plead or appear at the hearing, held on March 3 and 4, 1943.

Section 738 of Chapter XV provided, in part, that the order of the Special Court under Section 714, approving the petition as properly filed, "shall have the effect of an adjudication of bankruptcy of the petitioner for the purposes of section 274 of the Internal Revenue Code * * *." Section 274 provides for immediate assessment of any deficiency determined by the Commissioner in respect of a tax imposed by Chapter I of the Code. The United States asserted no claim of tax deficiency until September 17, 1946, when the Internal Revenue Agent in Charge at Denver notified the Railway Company of proposed additional taxes aggregating $3,001,061.73, plus interest, for 1942 and 1943. Meanwhile, in executing the Plan, the Railway Company had devoted substantially all its earnings to reduction of its debt, including payment of some $19,000,000 to Reconstruction Finance Corporation in principal and interest.

On October 4, 1948, the Railway Company filed a supplemental petition in the original case to bar the United States from claiming additional liability of the Railway Company and its subsidiaries for income taxes for the year 1942 and from claiming other and different bases and methods from those used by the Railway Company and its subsidiaries in their consolidated income and excess profits tax returns for 1940, 1941, and 1942.

The special District Court entered its findings of fact, conclusions of law and judgment on April 29, 1949, *In re*

Colorado & S. R. Co., 84 F. Supp. 134. The Court granted the relief prayed.

The petition for certiorari states that the two questions to be determined are (1) whether the special District Court had jurisdiction to render a judgment as to the Railway Company's liability for additional 1942 and 1943 taxes; and (2), if so, whether the decree of March 8, 1943, is *res judicata* that the Railway Company owes no additional taxes for 1942, and that the data, computations, deductions and carryovers on its returns for 1940, 1941, and 1942 were correct and must be used in computing tax liability for 1943.

Before reaching those questions there are, however, two points to be decided, (1) whether this Court has jurisdiction to issue a writ of certiorari in this case, and (2), if so, whether the case is of such importance as to warrant the issuance of the writ. It is the position of respondent that both questions must be answered in the negative. Congress did not intend to make a review on writ of certiorari available to the United States, and this was admitted by the representative of the Treasury Department while Chapter XV was before Congress. The case is not of general interest as a precedent for the reason that Chapter XV has expired and, in the necessity for expeditious action and otherwise, it differed from other parts of the Bankruptcy Act, relied upon by the United States.

Amplification of Petitioner's Statement.

The statement by petitioner is reasonably accurate and is accepted by the respondent with the following amplifications:

On page 4 of the petition, it is said that the United States made "an investigation before the hearing." This is correct, but there should be added that the investigation

consisted of an inquiry and inspection made by a representative of the Treasury Department at the office of the Company's General Auditor at Denver, early in 1943, before the hearing was had on the Plan. This representative was shown copies of the tax returns for 1940 and 1941, and his attention was called to the large carry-over credits therein available for 1942 and subsequent years. He was informed that because of such carry-overs there would be no 1942 taxes, further that amended returns for 1940 and 1941 would be filed by March 15, 1943, which would greatly increase these carry-over credits, and that such amended carry-overs would be used in the 1942 return. The work sheets for the amended 1940 and 1941 returns likewise were exhibited to him (R. 221).

Also on page 4, it is said by petitioner that the United States "did not appear at the hearing." It should be added that the United States not only failed to appear at the hearing, but filed no pleading or claim and made no appearance in any manner in the case until served with notice of the Supplemental Petition of October 4, 1948.

On page 5, petitioner states that amended income tax returns for 1940 and 1941 were filed by the taxpayer, March 12, 1943. It should be kept in mind that the contents of these amended returns, and the intention to file them, had been brought to the attention of the Government's investigator in the Plan proceeding early in 1943, before the hearing (R. 221).

Attention is called to the fact that the Government has printed only a part of the Record. A large number of exhibits, orders and other documents have been omitted (R. 267-272).

SUMMARY OF ARGUMENTS IN OPPOSITION TO GRANTING THE WRIT.

1. The Supreme Court has no appellate jurisdiction, except such as is conferred by Acts of Congress.

2. The McLaughlin Act limits review to a certain class of parties.

3. No party to a proceeding under that Act may have review unless he is "affected by the Plan."

4. The petitioner here may not have review:

(a) Because under the terms of the statute, the United States, while a creditor, is not a creditor who holds an evidence of his debt or an instrument defining his rights which are modified by the Plan.

(b) Because the Special Court in its original decree held correctly under the facts and the law that the United States was not a creditor on any claim affected by the Plan.

5. Review of this case is not important to the public:

(a) The statute involved has expired.

(b) A decision in this case will not be instructive to the Commissioner in administering other tax statutes, all of which are dissimilar.

6. Review will not settle for the guidance of the Commissioner any provision of the Revenue Code:

(a) Since this action was decided solely upon the provisions of the McLaughlin Act.

(b) Since no provision of the Revenue Code is similar in text or import to the McLaughlin Act.

7. Established rules applicable to former adjudication were not departed from by the Special Court:

(a) Because the case was decided principally upon the basis that any other decision would interfere with the execution of the Plan theretofore adopted.

(b) Because the original decree and the decree in question involved the same cause of action, and there had been no intervening change of law.

ARGUMENT.

I.

This Proceeding Rests On a Special Statute Which Does Not Authorize This Court to Grant Certiorari, Since (a) Reviews Are Limited to Persons Affected By the Plan, and (b) the United States Is Not Affected By the Plan, Within the Express Terms of the Statute.

Former Chapter XV of the Bankruptcy Act (56 Stat. 787) sometimes referred to as the McLaughlin Act, defines "Creditors" as including "all holders of claims, demands, and obligations of whatever character against the petitioner or its property, whether or not such claims would otherwise constitute provable claims in bankruptcy * * *" (§ 705); provides that a creditor shall not be deemed "affected" by any plan unless it modifies his evidence of debt, or the instrument defining his rights, or his security (§ 706); and limits the right to apply to the Supreme Court for certiorari to those "affected by the plan" (§ 745). As to taxes, the United States is classified as a creditor (§ 722).

The Government is not affected by the Plan because with respect to taxes it holds no evidence of the debt, instrument defining its rights, or a security. The Colorado and Southern Plan could not and did not propose a modification of anything regarding taxes (R. 80-95).

The United States always has known that Chapter XV vested it with no right to ask review, on a tax claim, because not affected by plans established thereunder. When the bill (H. R. 6840) was before Congress, Mr. Stanley Surrey, Assistant Tax Legislative Counsel of the Treasury Department, appeared before the Special Subcommittee on Bankruptcy and Reorganization of the House Judiciary

Committee and sought amendments which would declare the Government to be "affected" by such plan, and thus enable it to apply for certiorari. He stated to the Committee (Hearings on H. R. 6840, 77th Congress, 2d Session, April 29, 1942, page 26):

> "It is also suggested that section 722 of the bill be changed so that, like section 199 of the Bankruptcy Act, as amended, it will provide that where the United States or any agency thereof or a Federal corporation is a creditor or stockholder, such claims or stock shall be deemed to be affected by the plan.
>
> "Under section 705, subdivision 4 of the bill, the United States is a creditor, and, as such, is permitted to file claims in the proceedings. The court, under section 738 of the bill is empowered to determine the amount and legality of claims of the United States for taxes and customs duties. It should be noted that under section 745 of the bill, only those persons 'affected by the plan' may apply for certiorari to the Supreme Court of the United States from any final order or decree entered by the special court, and that by virtue of section 706 of the bill, the United States, although a creditor, would not be deemed to be affected by any plan unless a modification of the evidence of debt or other instrument defining the rights of creditors is proposed by the plan. *It is not believed that tax claims or customs duties of the United States fall within the meaning of section 706 because they are not based upon any evidences of debt or other instruments defining the rights of creditors. By reason of these provisions it would seem that the United States would be deprived of an appellate forum for the determination of tax claims or customs duties,* unless section 722 of the bill is amended to provide that 'the claims or stock' of the United States are deemed to be affected by a plan under this chapter. * * *." (Emphasis supplied.)

And, as appears from the same source, page 27, Mr. Surrey later wrote Hon. Charles F. McLaughlin, Chairman of the Subcommittee, proposing that Section 722 be amended to

provide that claims held by the United States "shall be deemed to be affected by a plan under this chapter * * *."

These amendments proposed by the Treasury Department, however, were not adopted. As passed, Chapter XV provides that only those affected by the plan may seek review (§ 745); and that only those whose evidence of debt or instrument defining rights or security is thereby modified, are to be deemed "affected" by the plan (§ 706). Rejection of the proposed amendments makes plain that Congress did not intend that the Government should have the right to apply for review from the decision of the three-judge Court with respect to taxes. *Fox* v. *Standard Oil Co. of New Jersey*, 294 U. S. 87, 96; *Tiller* v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 66; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 457, and *Carey* v. *Donohue*, 240 U. S. 430, 437.

From the beginning the Supreme Court has held that, under Section 2 of Article III of the Constitution, this court's appellate authority is not to be assumed or implied, but must be expressed in a statute. In *Colorado C. C. Mining Co.* v. *Turck*, 150 U. S. 138, 141, it was said:

> "From *Wiscart* v. *Dauchy*, 3 U. S. 3 Dall. 321, to *American Constr. Co.* v. *Jacksonville T. & K. W. R. Co.*, 148 U. S. 372, it has been held in an uninterrupted series of decisions that this court exercises appellate jurisdiction only in accordance with the acts of Congress upon that subject."

The rule was applied in the following decisions: *Clarke* v. *Bazadone*, 1 Cranch. 212, 213; *Durousseau* v. *United States*, 6 Cranch. 307, 313-4; *Parish* v. *Ellis*, 16 Peters 451, 453; *Barry* v. *Mercein*, 5 How. 103, 119; *Ex Parte Vallandigham*, 1 Wall. 243, 249-50; *Daniels* v. *Chicago & Rock Island R. R. Co.*, 3 Wall. 250, 254; *Walker* v. *United States*, 4 Wall. 163, 165; *Ex Parte McCardle*, 7 Wall. 506, 513; *Merrill* v. *Petty*, 16 Wall. 338, 345-6; *Murdock* v. *Mayor of Memphis*,

20 Wall. 590, 620; *The Francis Wright,* 105 U. S. 381, 385; *Elgin* v. *Marshall,* 106 U. S. 578, 580; *Snow* v. *United States,* 118 U. S. 346, 354; *Farnsworth* v. *Montana,* 129 U. S. 104, 113-4; *In re Heath,* 144 U. S. 92, 96; *United States* v. *Sanges,* 144 U. S. 310, 319; *National Exchange Bank* v. *Peters,* 144 U. S. 570, 572; *Cross* v. *United States,* 145 U. S. 571, 574; *Maynard* v. *Hecht,* 151 U. S. 324, 328; *Chapman* v. *United States,* 164 U. S. 436, 446; *Brown* v. *United States,* 171 U. S. 631, 637; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor,* 210 U. S. 281, 292; *Laurel Oil & Gas Company* v. *Morrison,* 212 U. S. 291, 296; *El Banco Popular de Economias y Prestamos* v. *Wilcox,* 255 U. S. 72, 76.

The principle that an appeal may be taken only in accordance with statutory authorization was given effect in the 77B reorganization case in bankruptcy of *Meyer* v. *Kenmore Granville Hotel Co.,* 297 U. S. 160, 165-6.

Former Chapter XV of the Bankruptcy Act was a special Act, passed to accomplish financial adjustments for Railroads. The provisions relating to review in a special law may not be disregarded and general provisions substituted, *Inter-Island Steam N. Co.* v. *Ward,* 242 U. S. 1, 3.

Clearly, the United States would have had no right to apply for certiorari under Section 745 of the McLaughlin Act with respect to the original decree of March 8, 1943 approving the Plan, because the Government was wholly unaffected by the Plan within the meaning of the McLaughlin Act. It has no greater right in the present proceeding, because this case is ancillary and subordinate to the original case (R. 258). This Court holds that it has no appellate jurisdiction over an ancillary or auxiliary proceeding, if it had none in the main case. *Rouse* v. *Letcher,* 156 U. S. 47, 50; *Gregory* v. *Van Ee,* 160 U. S. 643, 645; *Carey* v. *Houston & T. C. Ry. Co.,* 161 U. S. 115, 128; *Pope* v. *Louisville N. A. & C. Ry. Co.,* 173 U. S. 573, 577.

An appellate review is not essential to due process of law; at most it is a matter of grace, *Luckenbach Steamship Co.* v. *United States,* 272 U. S. 533, 536.

A prior Chapter XV (the Chandler Act) of the bankruptcy statutes, expiring July 31, 1940 (53 Stat. 1134) was substantially the same in purpose and content as the later McLaughlin Act, including Section 745, relating to review. In proceedings under the Chandler Act approving a Plan for the Baltimore and Ohio, persons not affected by the plan made claims which were denied by the three-judge Court. In an attempted appeal to the Circuit Court of Appeals that Court said in *Ackert* v. *Baltimore & O. R. Co.* (C. C. A. 4), 115 F. 2d 455, 458-9, with respect to right of review (emphasis supplied):

> "The appellants in cases Nos. 4716 and 4717 complain that this construction of the act leaves them without any opportunity of review whatsoever, because § 745 is limited to an application for a writ of certiorari by *'any person affected by the plan who deems himself aggrieved';* and, it is said, this language does not cover a person aggrieved by the denial of counsel fees that form no part of the plan. Assuming that this narrow construction of the section is correct, it does not follow that an appeal lies to the Circuit Court of Appeals. While an appeal from the decree of a District Court is a customary statutory procedure, *it exists only by grace of the statute and not otherwise. The mere fact that the interests of a person are adversely affected by a decree of court does not give him a right of appeal. Bradford* v. *Southern R. Co.,* 195 U. S. 243, 250, 25 S. Ct. 55, 49 L. Ed. 178; *In re Philadelphia & Reading Coal & Iron Co.,* 3 Cir., 103 F. 2d 901; *Burns* v. *Ender Coal & Coke Co.,* 7 Cir., 104 F. 2d 964; *In re Haytian Corp. of America,* 2 Cir., 112 F. 2d 146, 147. • • •
>
> *"We conclude that Congress provided in Chapter XV of the Bankruptcy Act a new and special procedure, complete in itself, and limited to a particular class of cases; and that the only permissible review of a decree*

or order of a three-judge court convened thereunder is that conferred upon the Supreme Court in its discretion to grant a writ of certiorari to any person affected by the plan who deems himself aggrieved thereby."

This Court denied certiorari, *Harvard State Bank* v. *Baltimore & O. R. Co.*, 311 U. S. 717.

In *United States* v. *Rice*, 327 U. S. 742, 749, this Court made the following pertinent announcement:

> "* * * To whatever extent the Government may be excluded from the operation of a statute in which it is not named, cf. *United States* v. *Stevenson*, 215 U. S. 190, 197, 54 L. Ed. 153, 156, 30 S. Ct. 35, with *United States* v. *California*, 297 U. S. 175, 186, 80 L. Ed. 567, 573, 56 S. Ct. 421, it is clear that the United States can not assert, by virtue of its sovereignty, a right of appeal which no statute has conferred, or which, if conferred, has been abolished."

The Court will also note that in the original decree of March 8, 1943 (R. 97) the special court held specifically that the United States had no "claim affected by the plan". Being unaffected by the Plan, within the meaning of the McLaughlin Act, the United States is not in position to ask certiorari, and the Court is without jurisdiction to grant it.

II.

Review Is Not of Public Importance. It Will Not Furnish a Guide for Administration of Any Tax Statute.

The Solicitor General first affirms (Pet. 9) and then negates (Pet. 10) the proposition that the Court should pass on the case for the guidance of the Commissioner of Internal Revenue in the administration of Chapter XV of the Bankruptcy Act. Such guide is neither needed nor usable. Chapter XV expired November 1, 1945, and no

further Plans of Adjustment may be established thereunder (§ 755, 56 Stat. 795, Pet. 32). In *District of Columbia* v. *Sweeney*, 310 U. S. 631, with respect to certiorari, the Court held: "Denied in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance."

Neither will a decision be a source of instruction to the Commissioner in administering the other tax statutes in bankruptcy, referred to in the petition. The McLaughlin Act (Ch. XV) required that the Plan be formulated, approved by the Interstate Commerce Commission and assented to by a designated number of creditors before filing in the District Court for consideration by three judges (§ 710); that notice then be given "forthwith" to the Secretary of the Treasury (§ 736) and reasonably soon "to all persons in interest" (§ 720); and that the hearing on the plan be held "promptly" (§ 720). A plan not approved within a year is to be dismissed (§ 727). Expedition is of the essence of the proceeding. If the Government was to have its tax claims recognized, it was obliged to bring them in before the plan was confirmed, whether the tax return day of March 15 had arrived or not; otherwise a plan under Chapter XV could not have been established with the speed that the statute prescribed. Unlike the McLaughlin Act, Section 77 (11 U. S. C. A. 205) for railroad reorganization proceeds more leisurely. The plan need not be proposed until six months after the petition is filed. The same is to be heard by the Commission thereafter (d), and still later by a court of one judge (e). Time is given for filing claims, which may be extended (c) (7). As all know, a number of years intervene before a plan is finally approved, and taxes need not be dealt with until final approval of the belated plan (e). The necessity for filing an income tax claim before March 15 for the last preceding year never arises in a Section 77 case.

Chapter X for corporate reorganization (11 U. S. C. A. §§ 501-676) presents the same situation. Plans are not formulated until after the petition is filed, and then within a subsequent time fixed by the Court, with hearing still later (§ 569). Time is allowed for claims (§ 596) and special provision is made for subsequent payment of all taxes, found owing within one year after the petition is filed but not assessed before confirmation of the plan, by the reorganized or successor corporation (§ 671).

Chapter XI authorizing "Arrangements" for unsecured debts (11 U. S. C. A. §§ 701-799) provides for an extensive proceeding to arrive at an Arrangement, with referee (§ 731), receiver or trustee (§ 732) appraisers (§ 733) creditors' meeting (§ 734) management of debtor's business by receiver (§ 743) issuance of certificate of indebtedness for purposes of the business (§ 744) and ultimate confirmation of the Arrangement (§§ 761, 762). Taxes found owing within a year after petition and not assessed before confirmation of the Arrangement must be paid afterwards by the debtor or by the corporation made use of to effectuate the Arrangement (§ 797).

Chapter XII (11 U. S. C. A. §§ 801-926) is much the same as XI. It relates to Arrangements with respect to debts secured by real property (§ 806); provides for referee, trustee, appraisers, creditors' meeting, continuation of business (§ 832-837, 845) certificates of indebtedness (§ 846) and consideration and confirmation of the Arrangement by creditors and Court (§§ 861-872). Like Chapters X and XI, Chapter XII provides that taxes, found owing within one year after the petition but not assessed before confirmation, shall be paid by the debtor or successor corporation.

Under none of the bankruptcy statutes referred to by the Government is it likely that the present question could arise, viz., must the United States file its tax claims and

contentions for the preceding year before March 15, in order that such claims and contentions may be considered in the formation of the plan? None of them required the expedition provided for by the McLaughlin Act. It alone contains a time limit for approval of the plan. The prime purpose of Chapter XV was by speedy action to save an embarrassed railroad from financial collapse, especially in meeting the demands of the war; whereas the other bankruptcy chapters referred to were enacted to provide a means of fairly dividing the debtor's assets, by reorganization, among creditors. It will be time enough to furnish the Commissioner a guide for the administration of these other chapters, now all of long standing, when questions arise thereunder.

In *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163, the Court held:

> "* * * The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

And in *Layne & Bowler Corporation* v. *Western Well Works*, 261 U. S. 387, 393:

> "* * * If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing con-

flict of opinion and authority between the circuit courts of appeal."

In his address before the American Law Institute, May 10, 1934, the then Chief Justice Hughes stated the rule thus (20 Am. Bar Ass'n. Jour. 341):

> "It is not the importance of the parties or the amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately administered. * * *"

III.

Review Is Not Needed to Settle, for the Guidance of the Commissioner, the Meaning of Section 53 and Others of the Internal Revenue Code. The Special Court Acted Under the McLaughlin Act, and Did Not Undertake to Interpret the Code.

The Colorado and Southern, in financial distress, filed its proposed Plan of Adjustment under the McLaughlin Act with petition for approval in the District Court November 9, 1942. Notwithstanding the facts that the war was then in progress and increased railroad traffic was being enjoyed, the Plan proposed elimination of all dividends to stockholders, reduction of interest rates, payment of interest in part only if earned, limitation of capital expenditures from current earnings to $300,000 a year, and the application of all other income to reduction of debt, for a period of thirteen years (R. 80-95). Because of its large invested capital and extensive excess-profits credits and losses to be carried over from depression years, and relying on methods and bases employed and returned in past tax returns for computation of depreciation and retirements, the Company foresaw no war taxes beyond those to be computed by using such methods and bases. It there-

fore made no provision in the Plan for additional taxes, stating in the petition that the Government was not a creditor for taxes (R. 10).

In accordance with the McLaughlin Act (§§ 736, 737) the Clerk of the Court on the day of filing served the Plan and petition on the Secretary of the Treasury, notified him December 15, 1942, that hearing would be had February 23, 1943, and again on January 26, 1943, that the hearing had been postponed to March 3, 1943 (R. 74, 124). Notwithstanding the foregoing, the United States made no appearance at the hearing, held March 3 and 4, 1943, and neither made claim for taxes nor gave notice that it would subsequently undertake to change the Company's tax returns for 1940, 1941 or 1942, whereby taxes would be greatly increased during plan-years. On the contrary, it stood by and permitted the Plan to be heard and approved, without a tax provision in its behalf. On this record and the evidence the Court found that the Government was not a creditor of the Railway for taxes, and approved the Plan without tax provisions (R. 80-95).

Thereafter, in execution of and reliance on the Plan, the Railway and subsidiaries paid the Government's Reconstruction Finance Corporation approximately $11,000,000 principal in reduction of indebtedness at full face amount, with $8,166,672 in interest; utilized $4,268,000 in purchases of its General Mortgage Bonds at an average price of forty cents on the dollar, with $3,212,125 interest to General Mortgage bondholders; and paid $11,891,734 in federal taxes, which, as a result of plan-reduced interest, was $1,556,339 more than would have been paid if the Plan had not been in operation (R. 168).

In 1946, after said payments had been made under the Plan to the depletion of the Company's Treasury and at the sacrifice of dividends and interest by stockholders and bondholders, the United States came forward with a dec-

laration of intention to rewrite the consolidated tax returns for 1940, 1941, 1942 and 1943, and thereby to greatly reduce the equity invested capital, revise depreciation rates back to 1913 in part, eliminate losses and credits subject to carryover from 1940, 1941 and 1942, and thus to increase taxes for 1942 and 1943 by more than $3,000,000 (R. 251, 252). The statutory six per cent interest on such increase, computed to December 31, 1948, would be $960,818 (R. 226). Such exaction would make further execution of the Plan impossible, render futile the sacrifices of dividends and interest made in reliance on continued performance of the Plan (R. 255), and unjustly deprive the Railway Company and its bondholders and stockholders of the benefits of the decree of the Special Court entered March 8, 1943.

Unable to dissuade the Bureau of Internal Revenue from its destructive course, the Railway Company filed a supplemental petition, ancillary to the original case in which the Plan was established, to enforce its rights under the Plan and the decree establishing the same (R. 106-119). April 29, 1949, in the ancillary proceedings, the Special Court of three judges rendered the judgment, review of which is asked, holding that because the United States had made default in 1943 and failed to make claim for income taxes for 1942 or to then propose changes (to be operative under the Plan) of the tax bases and methods previously reported in the 1940 and 1941 returns, it was barred by the decree from so doing (R. 258-264). The gist of the decision is that the United States could not remain silent about 1942 taxes and proposed changes of bases and methods used in earlier returns when the Plan was being established by the Court, and during years of its partial execution to the great benefit of Reconstruction Finance Corporation, and then come forward in the face of the decree with 1942 claims and changes for prior

years, to the destruction of the Plan and injury of those who had acted in reliance thereon.

The Special Court ruled that it was the Government's duty to present its claims for 1942 taxes, and proposed changes in the 1940 and 1941 returns, prior to confirmation of the Plan March 8, 1943, or at most within the six months following, under Rule 60 (R. 247, 260). In opposition the United States now advances the untenable theory that, because sections 53(a)(1), 271, 275(a) and 279 of the Revenue Code contemplate in normal course that the annual process of determining and assessing income taxes starts with the filing of the taxpayer's return, the Government was helpless with respect to 1942 taxes until return was filed March 15, 1943. The error in this is that the Solicitor General (like the Secretary of the Treasury in 1943) disregards the fact that this is a proceeding under Chapter XV, specially enacted to accomplish speedy railroad adjustments in time of distress; and that necessarily its tax requirements are controlling over Revenue Code provisions intended for normal application. Here a Plan of Adjustment was being established under a statute calling for speed. To act upon such plan intelligently, and to make one that would work, it was necessary that the Court have before it all assets and resources of the debtor, on the one hand, and all the claims against it, on the other, so that the resources might be spread and the claims reduced and postponed in order to make the former ultimately take care of the latter. That could not be done if a $3,000,000 tax claim were withheld from the Court.

Congress provided against such miscarriage in the McLaughlin Act by making the Secretary of the Treasury the representative of the United States in all Chapter XV cases with respect to taxes (§ 722), providing that notice and copies be given him forthwith upon institution of a plan case (§ 736) and that he be notified thirty days in

advance of hearing (§ 737), vesting the Special Court with jurisdiction to determine amount and legality of taxes and to order payment (§ 738), making approval of the petition equivalent to adjudication of bankruptcy for purposes of § 274 of the Revenue Code (id.) and enacting that if the United States is a "creditor" for taxes the plan should not be confirmed unless it provides for payment thereof (§ 722). What is this but a direct command to the Treasury Department to appear in every Chapter XV case and present the Government's tax claims in time to be dealt with in the formation of the plan, regardless of the time of year the hearing was had? The very nature of the matter demanded that the Government come in with its taxes in time, or forever keep quiet. If creditors may remain away while a plan is being established, and after decree destroy the plan by then asserting their claims, proceedings under Chapter XV are futile.

In *American Service Co.* v. *Henderson* (C. C. A. 4), 120 F. 2d 525, 532, it was held that a claimant to an escrow fund was barred because he had not presented his claim to the fund while the escrow holder was undergoing Section 77B reorganization. On the necessity of presenting all claims while the plan is being considered, the Court said:

> "The very kernel of a reorganization proceeding is the careful consideration given to all outstanding liabilities, debts, and claims. Only in the light of such an examination does it become possible for the bankruptcy court to determine whether the corporation as recapitalized can weather the financial storm. Cf. Caplin, Valuation and Earnings in Railroad Reorganization (1941), 27 Va. L. Rev. 769, 789. For such an examination and such a determination to be successful, every obligation of the debtor must be brought before the eye of the court."

In re Lehigh Valley R. Co. (D. C. Pa.), 34 Fed. Supp. 750, 752, relied on by the Government, was a case under

Chapter XV of the Bankruptcy Act, as first enacted (53 Stat. 1134). On this point, with respect to an asset of some $3,500,000 the Court said:

> "Before we finally approve and confirm the plan of adjustment filed in this case, Clause (3) of Section 725 of the Bankruptcy Act requires that we must find that the plan is fair and equitable as an adjustment and affords due recognition to the rights of each class of creditors and stockholders. In considering these questions it is obvious that the court will have to take into consideration so important an asset as the net amount to be recovered in the Black Tom Explosion case."

For like reason it was imperative that the Special Court have before it and take into consideration the Government's $3,001,061.73 tax claim in this case before acting on the Plan, if that claim was subsequently to be recognized. The Secretary of the Treasury was bound to observe the requirements of the McLaughlin Act and submit his claims while formation of the Plan was still before the Court, if a successful plan was to be made. He was not at liberty to rest his inactivity on general provisions of the Revenue Code which in normal situations allowed him to wait until March 15 to go to work.

The Treasury Department always has understood that under the McLaughlin Act tax claims must be presented before confirmation of the Plan. When the Act was before Congress, Mr. Surrey of that Department in his appearance in April, 1942, previously mentioned, before the Special Subcommittee stated (Hearings on H. R. 6840, 77th Congress, 2d Session, April 29, 1942, page 26, emphasis supplied):

> "In view of the *binding effect* of a plan confirmed under Chapter XV, it is suggested that a provision be inserted similar to Section 271 of the Bankruptcy Act, as amended, *in order to take care of taxes undetermined, or unassessed at the date of confirmation of the Plan.* This is a saving provision in the interest of

Federal and state income taxing agencies. It is intended to keep open for one year after the date of the filing of the petition, tax claims where the debtor did not file a tax return and such return should have been filed before the date of his petition, *or where the time for filing the tax return had not expired on the date of the petition, or where the taxable year had not expired on the date of the petition.*"

Mr. Surrey submitted to the Committee a new section to keep tax claims open a year; but that recommendation of the Treasury Department was not adopted by Congress. Omission of this provision urged by Mr. Surrey indicates that Congress intended that all claims for taxes should be filed before confirmation of the Plan. *Carey* v. *Donohue,* 240 U. S. 430, 437; *Fox* v. *Standard Oil Company of New Jersey,* 294 U. S. 87, 96; *Tiller* v. *Atlantic Coast Line R. R. Co.,* 318 U. S. 54, 66; and *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 457.

The Regulations themselves of the Treasury Department made plain its duty to bring in its tax claims before the Plan was confirmed. Section 29.274-1 of Regulations 111 is, in part, as follows (Please notice the reference to Chapter XV):

"As used in these regulations the term 'bankruptcy proceeding' includes proceedings under Chapters I to VII of the Bankruptcy Act, as amended, or under section 74, 75, 77, or 77B, or Chapters X to XIII, or Chapter XV, of such Act, as amended; and the term 'adjudication in a proceeding under Chapters I to VII, the approval of a petition as properly filed under section 77 or 77B or Chapter X by a court of competent jurisdiction or the filing of a petition under section 74 or 75 or Chapters XI to XIII or Chapter XV with a court of competent jurisdiction.

• • •

"Collectors should, promptly after notice of outstanding liability against a taxpayer in any bankruptcy or receivership proceeding, and in any event within

> the time limited by the appropriate provisions of the Bankruptcy Act, as amended, and the orders of the court in which such proceeding is pending, file claim covering such liability in the court in which such proceeding is pending. *Such claim should be filed whether the unpaid taxes involved have been assessed or not,* except in cases where the departmental instructions direct otherwise; * * *" (Emphasis supplied.)

The Petitioner seeks to excuse prompt filing of its tax claims on the ground that the United States was not a creditor of the Railway for 1942 taxes until return was filed March 15, 1943. Here again the McLaughlin Act is disregarded. "Creditors" the Act provides "shall include all holders of claims, demands and obligations of whatever character against the petitioner or its property, whether or not such claims would otherwise constitute provable claims in bankruptcy, * * *." (705(4)). This Court held in *Gardner* v. *New Jersey,* 329 U. S. 565, 573, that a similar definition in Section 77 made a State a "creditor" on a tax claim. Section 722 of the McLaughlin Act characterizes the United States as a "creditor". By the end of 1942 the Company and subsidiaries had received all income and incurred all expenses which determined their consolidated income and excess profits taxes, if any, for that year. Although not reportable or payable until March 15, 1943, the liability for whatever 1942 taxes there were was created by facts occurring within the year 1942, and of necessity such liability was in being at all times after the end of the year. The United States was therefore a "creditor" under Section 705(4) for 1942 taxes after December 31, 1942.

It has been decided that, when the facts have occurred which create a liability for a tax, the tax is "legally due and owing" and is to be filed in bankruptcy, even though not yet returnable or payable. *New Jersey* v. *Anderson,* 203 U. S. 483, 494; *People of N. Y.* v. *Jersawit,* 263 U. S.

493, 496; *Massachusetts* v. *Meehan* (C. C. A. 1), 67 F. 2d 638, 640; *Bates* v. *Archer* (C. C. A. 6), 288 Fed. 182, 184.

The authorities are to the point that the sovereign, Federal or State, must promptly file its claims in bankruptcy or be barred. *New York* v. *Irving Trust Co.*, 288 U. S. 329, 333; *Gardner* v. *New Jersey*, 329 U. S. 565, 577; *In re Anderson* (C. C. A. 2), 279 Fed. 525, 529; *In re General Film Corporation* (C. C. A. 2), 274 Fed. 903, 904; *United States* v. *Eyges* (D. C. Mass.), 286 Fed. 683, 684; *In re Stavin* (D. C. N. Y.), 12 F. 2d 471, 473-4; *McCarl* v. *Halstead* (C. C. A., D. C.), 45 F. 2d 665, 666-7; *In re Morgenstern & Co.* (C. C. A. 2), 57 F. 2d 163, 164; *In re De Angeles* (C. C. A. 10), 36 F. 2d 218, 219.

It is plain that the Special Court did not disregard or misconstrue the general sections of the Revenue Code, for filing returns by March 15, or for action by the Commissioner afterward. It had no occasion to construe or apply such general provisions. What the Court did was to apply the special tax provisions of the McLaughlin Act to a case under that Act. There is therefore no reason, on account of anything done in this case, for a review by the Supreme Court, to construe the general provisions of the Internal Revenue Code for guidance of the Treasury Department.

Even under the Government's own construction of Section 738 of the McLaughlin Act, bringing Section 274 of the Revenue Code into operation in the case, it was the Commissioner's duty to make an immediate assessment of any 1942 deficiency after the 1942 return was filed on March 15, 1943, and file claim therefor with the Special Court. Such course at least would have enabled the Railway to pay any tax then found due out of its war earnings, instead of thereafter stripping itself of funds to pay the Government's Reconstruction Finance Corporation some $19,000,000 in principal and interest in execution of the Plan.

The Government had ample means and legal power to assemble data for a 1942 claim prior to confirmation of the Plan on March 8. All information necessary for determination of 1942 income and excess profits taxes was available to it at the Company's office in Denver on and after January 25, 1943 (R. 223). Section 3614(a) of the Internal Revenue Code empowered the Commissioner, "for the purpose of making a return where none has been made" to examine the taxpayer's books, and require the taxpayer to give testimony in regard thereto. In fact the Government made such investigation six weeks before the hearing (R. 221) and then dropped the matter. Having instituted a proceeding for approval of a Plan, which required the Government to file its claim before March 8, the Railway was bound on request to place its records at the disposal of the United States for preparation of such claim, whether March 15 had arrived or not.

If not ready when hearing on the Plan was reached, the Government could have asked postponement. If afterwards surprised by the 1942 return filed March 15, 1943, or if failure to file a claim for taxes was due to an excusable Treasury Department oversight, the decree could have been opened and the Plan modified if practicable, or vacated if necessary, to take care of taxes found due, within the six months then allowed by Rule 60 of the Rules of Civil Procedure. *Norris* v. *Camp* (C. C. A. 10), 144 F. 2d 1, 4.

Furthermore in principal part, the tax claims first asserted in 1946 by the United States do not depend on the 1942 return. They go back to the returns of 1940 and 1941, and there reduce the Company's equity invested capital by some $42,500,000, eliminate depreciation of property to the extent of $632,000, exclude retirement loss deductions amounting to $1,159,000, and extinguish carry-over excess profits credits from 1940 and 1941 to the extent of approxi-

mately $3,000,000 in each year (R. 251, 252). No March 15, 1943, return-day argument is available to uphold the plan-wrecking changes which the United States proposes to make in the 1940 and 1941 tax returns.

Moreover the appendices attached to the Plan, served on the Secretary of the Treasury at the inception of the proceeding, notified him that the Railway at that time claimed an invested capital of $48,000,000 on stock and $16,200,263 in accumulated earnings and profits, and exhibited to him the inclusion of the annual depreciation claimed on rolling stock for the preceding ten years (Appendices to Plan of Adjustment, Appdx. III, p. 55 and Appdx. IV, pp. 58-60, served separately from the printed Record). He was not required to await the 1942 return to learn any of those things.

IV.

The Special Court Made No Departure from the Established Rule of Res Judicata. Review Is Not Required to Keep That Rule Straight.

With respect to *res judicata* the Government assumes a number of false premises. The principal error is the assumption, repeated in the petition seven times, that the United States was not a party to the proceeding in which the Plan was established. Again eyes are closed to the McLaughlin Act. Section 722 makes the Secretary of the Treasury the representative of the United States in every Chapter XV case. It requires that copies of papers and notice of hearing be served on him (§§ 736, 737); and a finding that these requirements have been met is a necessary condition to the entry of a decree of confirmation (§ 725 (7)). If there are taxes (to be claimed by the Secretary) *the plan is not to be approved unless the taxes are provided for* (§ 722). To that end the Special Court is to determine the

amount and legality of taxes as between the Secretary and the Company, and to order payment of those found owing (§ 738). The Secretary was duly served in the manner prescribed by § 736 (R. 74, 124). That made the United States a party. Statutory authorization for a proceeding, to which the Government is a necessary party, constitutes consent to make it a party; and the prescribed notice to the designated officer constitutes the process (*United States* v. *Hellend*, 322 U. S. 363, 368). The Court has held that notice given by publication and mail in accordance with statute (*Chicot County Drainage Dist.* v. *Baxter State Bank*, 103 F. 2d, 847, 848) made bondholders parties to a proceeding for "Municipal Debt Readjustments," though not appearing, so as to be bound by the decree on principles of *res judicata* (*Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 378). Since a plan may not be approved unless taxes found owing are provided for (§ 722) and since the amount and legality of taxes cannot be determined without the presence of the United States (§ 738), it follows of necessity that service of the papers and notices provided for (§§ 736 and 737) makes the Government a party; otherwise enactment of Chapter XV was a futility. It never was the Congressional intent that the Secretary should determine for himself whether or not the United States would become a party. It would be a new doctrine that one served with process in a case could eliminate himself therefrom by making default. If by remaining away and keeping silent about taxes, the Secretary could prevent the United States' being a party, no plan could ever be confirmed in view of section 722, if there were taxes. The McLaughlin Act made the Government amenable to process, the same as all others having an interest in the plan. The Government has confused default by one served with absence of service in the first place.

Another erroneous assumption is that the present ancil-

lary proceeding is a declaratory judgment case. A suit for declaratory judgment asks a declaration of rights in advance, as a guide to future conduct. Enforcement requires a second proceeding, in event the declared rights are subsequently violated (Judicial Code §§ 2201-2; *Great Lakes D. & D. Co.* v. *Huffman*, 319 U. S. 293, 295). The Colorado and Southern's rights were determined in the decree of March 8, 1943, confirming to it a Plan of Adjustment, whereby it was to have its entire slender resources, after payment of interest in part and no dividends, applied in reduction of its debt, to the exclusion of then unheard of prior taxes and undisclosed changes in prior tax returns (R. 80-95). The Supplemental Petition was not a request for a redeclaration of those rights already adjudged, but was an application to protect and enforce those rights against taxes and tax-return changes antedating the Plan (R. 106-119). The Supplemental Petition takes its root in section 746 of the McLaughlin Act empowering the Special Court to protect and enforce rights under the previously decreed Plan, and in the rule of law that a court in an ancillary proceeding has full power to protect and enforce its decree in the main case (*Local Loan Co.* v. *Hunt*, 292 U. S. 234, 239). A presently coercive judgment was sought (R. 117-119) and was awarded (R. 263-264); and not a mere declaration to be enforced by another petition later.

Another erroneous assumption is that the taxes claimed are something outside the Plan. On the contrary, the liability for 1942 taxes, if there were any taxes for that year, was created by income received during 1942, and necessarily was complete as an existing liability at the termination of business December 31, 1942. It was therefore a claimed tax liability to be asserted by the Government at the hearing in the following March, and was a tax liability, if found good, to be provided for in the

Plan under section 722. Both the 1942 and enlarged 1943 taxes, now claimed by the Government, rest chiefly on changes sought to be made in 1946 by the United States in the 1940 and 1941 tax returns, reducing equity invested capital, eliminating expense and loss deductions on account of depreciation and retirement of property, and destroying carry-over credits and losses set forth in those returns. All of this went back of the Plan by two years; but now projects itself adversely into the execution of the Plan years after formation. If the six-year old claims prevail, they will consume resources relied on in 1943 by parties and court for performance of the Plan, and render its future execution impossible. The claimed taxes are not something apart from the Plan.

A fourth erroneous assumption is that the Special Court undertook to adjudicate taxes. No taxes were adjudicated as such. The Court exercised its jurisdiction under section 746 of the McLaughlin Act to protect and enforce the rights of the parties under the Plan. True, it dealt with tax claims; but it did so because the rights to be protected were threatened with invasion by tax claims which had previously been adjudicated against the United States. The action of the Special Court was taken none the less to protect rights under the Plan, even though the thing to be protected against was a tax claim. This was not adjudication of taxes.

Traditional rules of *res judicata* were not departed from by the Special Court. The Plan proposed by the Railway made no provision for taxes and the petition stated that the United States was not a creditor for taxes (R. 10, 80-95). This constituted an allegation and position that there would be no taxes, under previously filed returns and current income, for which funds need be appropriated in the Plan, or diverted therein from other Plan purposes. The Government did not contest the proposition; and made no

proposal that the Plan be modified, to divert resources and income from creditors and reduction of debt, to payment of taxes which the Government might claim for 1942 or subsequent years, by changing the bases and methods used in the 1940 and 1941 returns. The United States' default confessed that no modification of the Plan was necessary on account of taxes, growing out of past transactions or changes to be made by it in regard thereto. The decree, approving the Plan as proposed, adjudicated that the Plan need not be modified, to the detriment of creditors or Company, to provide funds for taxes for 1942 or later years based on any facts then existing of which the Government then had or could obtain knowledge.

Despite the 1943 decree, the Government proposes now to modify the Plan in effect by compelling the Company to divert income, set aside by the Plan for other creditors and reduction of debt, to payment of claimed taxes based on changes it proposes to make in the 1940, 1941 and 1942 returns. The Special Court ruled that the Government was barred from so doing by the adjudication contained in the decree which established the Plan. This was no violation of the rule of *res judicata*.

The United States had been served; and, notwithstanding its default, had its day in court. Judgment by default is as binding as any other, *Leadville Coal Co.* v. *McCreery*, 141 U. S. 475, 478; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 694-5.

Chicot County Drainage District v. *Baxter State Bank*, 308 U. S. 371, 378, applied *res judicata* upon a decree establishing a "plan of readjustment," entered in default of the party involved. A proceeding took place in bankruptcy under Act of May 24, 1934 for adjustment of indebtedness of the drainage district. Bondholders were notified by publication and mail. Like the United States here, certain bondholders did not appear (103 F. 2d 847, 848). Their bonds were decreed cancelled with the others

and ordered refinanced. Thereafter that Act was adjudged unconstitutional in other litigation; whereupon the non-appearing bondholders brought an independent suit against the drainage district on their original bonds, on the theory that the bankruptcy court had been without jurisdiction under the unconstitutional statute to cancel the bonds. But this court held that the decree approving the plan and cancelling the bonds, remaining unappealed from, was *res judicata,* even though the bondholders had not appeared, which precluded later recovery on the bonds.

In *American Service Co.* v. *Henderson* (C. C. A. 4), 120 F. 2d, 525, 532, the court held that a decree confirming a plan of reorganization under Section 77B barred Henderson's suit on a claim against the debtor for an escrow fund, because Henderson did not assert his claim to the fund in the reorganization proceedings, nor sue until after the reorganization plan had been confirmed by decree.

In *Black* v. *Richfield Oil Corporation* (C. C. A. 9), 146 F. 2d, 801, 805, Black had a contract with a petroleum company, which went through reorganization under Section 77B. During reorganization he took no action in that proceeding looking to reformation of the contract. The Richfield Corporation as a part of the reorganization acquired the assets of the petroleum company, including the contract. Thereafter Black sought reformation in an independent suit. It was held that he was barred from such relief by the 77B decree. This court denied certiorari (325 U. S. 867).

The Court of Appeals for the Tenth Circuit in *Norris* v. *Camp,* 144 F. 2d 1, 4, held that a decree confirming a plan in a Town's composition proceeding, whereby certain of its bonds were ordered refinanced, was *res judicata* of the validity of the bonds, so long as the decree stood. It is plain that a decree approving a plan is *res judicata* of all matters entering into the Plan—especially those upon which it depends for its execution.

Petitioner invokes *Commissioner* v. *Sunnen*, 333 U. S. 591. It is without application because there the two actions involved different causes of action, with a change of law intervening. Here the cause of action is the same one in each instance without change of law coming in. The latest applicable decision on *res judicata* is the *Chicot* case, 308 U. S. 371, 378, resting on a decree confirming a plan. In the plan proceeding the bondholder parties defaulted and did not question the constitutionality of the Act, in an effort to preserve their bonds from reduction in amount. In a second suit on the same bonds for full amount, they were precluded by *res judicata* from asserting unconstitutionality of the same Act. The Court said:

> "The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 74 L. ed. 972, 50 S. Ct. 374, *supra; Cromwell* v. *Sac County*, 94 U. S. 351, 24 L. ed. 195, *supra.*"

The claimed rights now contended for by the Government, and rejected in the questioned judgment, are precisely the same claimed rights it would have had to assert, if it had appeared in the Plan proceeding and sought taxes based thereon, viz., the claimed right to write down the equity invested capital, depreciation and retirements in the 1940, 1941 and 1942 returns in order to prevent the same, and resulting carry-over excess profits credits and operating loss deductions of the earlier years, from being used in 1942 and 1943.

The Railway's equity invested capital and methods and

rates of depreciation and retirement losses, long claimed and used by it, were on file with the Government in the tax returns of 1940 and 1941, prior to the promulgation of the Plan of Adjustment in 1942 and 1943. Exhibits 8 and 9 (introduced R. 219; not printed by Petitioner). Those returns set forth also the carry-over credits and losses deductions flowing therefrom. All were of great importance to the Company in holding down war taxes during execution of the Plan. The carry-overs were assets, having the attributes of property usable in discharging taxes which would otherwise become payable. Like the contract in the *Black* case, they "acquired a definite status in the reorganization proceedings" (41 Fed. Supp. 988, 996) not thereafter changeable, in the face of the decree approving the Plan. Unchallenged as they were by the United States, Company and Court had every right to rely on them in coming to the conclusion that the Plan would work and should be adopted. Unchallenged, no amendment of the Plan was necessary. Had they been challenged, and the challenge found good, modification of the Plan would have been imperative, to the disadvantage of Company and creditors, if there was to be a plan at all. The decree, confirming the Plan without modification, was therefore an adjudication that the available income of the Railway thereafter was to be applied under the Plan to payment of the reduced interest and to reduction of debt, and not to subsequently claimed 1942 taxes, or later taxes asserted by changing the 1940 and 1941 returns.

Respondent urges that the petition for writ of certiorari be dismissed and the writ denied.

Respectfully submitted,

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September, 1949.